IN THE
SUPREME COURT OF THE STATE OF MICHIGAN

On Appeal From The Michigan Court Of Appeals
Borello, P.J., and White and Smolenski, J.J.

MILISSA MCCLEMENTS,

Plaintiff-Appellee/Cross-Appellant,

vs.

FORD MOTOR COMPANY

Defendant-Appellant/Cross-Appellee.

Supreme Court No. 126276

Court of Appeals No. 243764

Oakland County Circuit Court
No. 01-034444-CL
Hon. Wendy L. Potts

BRIEF ON APPEAL - APPELLANT
PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

By Order dated December 27, 2004, this Court granted the application for leave filed on June 3, 2004 by Defendant-Appellant/Cross-Appellee Ford Motor Company ("Ford") concerning the unpublished *per curiam* opinion of the Court of Appeals issued April 22, 2004 (Apx 17a-23a). In its application, Ford sought reversal of the Court of Appeals' opinion to the extent it reversed the Oakland County Circuit Court's August 2, 2002 opinion and order granting Ford's motion for summary disposition on Plaintiff-Appellee/Cross-Appellant's negligent retention claim. (Apx 5a-16a). This Court has jurisdiction pursuant to MCL 600.215(3); MSA 27A.215(3). See also MCR 7.301(A)(2), MCR 7.302(G)(3).

For the reasons stated herein, Ford submits that this Court should reverse the Court of Appeals' ruling on negligent retention and reinstate in its entirety the Oakland County Circuit Court's August 2, 2002 opinion and order granting summary disposition in favor of Ford.

QUESTIONS PRESENTED

I. Whether the trial court properly dismissed a claim for "negligent retention" where the claim sought a common law remedy for workplace sexual harassment contrary to Michigan law, legislative intent and evidentiary principles.

Answer of the Court of Appeals: "No"
Answer of the Circuit Court: "Yes"
Answer of Appellant: "Yes"

II. Whether the trial court properly dismissed a claim for "negligent retention" where the only evidence, aside from speculation, of an alleged "propensity" to engage in misconduct was a single misdemeanor conviction for non-workplace conduct.

Answer of the Court of Appeals: "No"
Answer of the Circuit Court: "Yes"
Answer of Appellant: "Yes"

III. Whether, in the event a common law tort for negligent retention is permitted to be superimposed on a statutory sexual harassment theory, the elements of notice to the employer and the scope of the duty not to retain should be at least as great as those imposed under the statutory scheme developed by the Michigan Legislature and interpreted by this Court.

Answer of the Court of Appeals: "No"
Answer of the Circuit Court: "Yes"
Answer of Appellant: "Yes"

I. INTRODUCTION

Plaintiff-Appellee/Cross-Appellant Milissa McClements ("Plaintiff") was an employee of AVI, a contractor operating cafeterias at Defendant-Appellant/Cross-Appellee Ford Motor Company's ("Ford's") Wixom Assembly Plant. Absent any employment relationship with Ford, Plaintiff claimed that Ford had a duty to protect her from alleged sexual harassment by Daniel Bennett ("Mr. Bennett"), a Ford employee, because Ford knew that Mr. Bennett once had a misdemeanor conviction for indecent exposure.[1] According to Plaintiff, once Ford learned of the conviction, which involved off-premises off-duty conduct toward three strangers to Ford and Mr. Bennett, Ford was under a duty to fire Mr. Bennett because of a supposed "propensity." Because Ford did not fire Mr. Bennett, Plaintiff's argument goes, it is liable in negligence for Mr. Bennett allegedly kissing Plaintiff in an AVI stockroom approximately three years later.

The misdemeanor of which Mr. Bennett was convicted did not attribute to him any such "propensity." He was not charged, convicted, or sentenced under a habitual offender provision or any other provision that required notification of a "propensity" to those who might come in contact with him, such as those offenses that require placement on the sex offenders' registry. The alleged event resulting in Mr. Bennett's misdemeanor convictions did not involve forcible kissing or any physical contact at all. Rather, the allegation that resulted in conviction was that Mr. Bennett, while driving on

[1] Plaintiff named Mr. Bennett as a Defendant in this case only with respect to the primary claim in her Complaint under the Elliott-Larsen Civil Rights Act. The Court of Appeals affirmed Mr. Bennett's dismissal from this litigation on summary disposition, relying on the holding in Jager v Nationwide Truck Brokers Inc, 252 Mich App 464, 478; 652 NW2d 503 (2002), lv den, 468 Mich 884; 661 NW2d 232 (2003), that the Elliott-Larsen Act does not impose individual liability. (Apx 23a). Mr. Bennett therefore is not a party to this appeal. Ford and Mr. Bennett will be referred to together hereinafter as "Defendants."

an interstate highway, exposed himself while passing another vehicle. Moreover, Mr. Bennett served his sentence and paid his debt to society, after which he requested and received a full expungement of the misdemeanor conviction.

Despite Plaintiff's hyperbolic arguments to the contrary, no court has gone so far as to declare an individual unemployable due to a single misdemeanor conviction, nor would it be sound public policy to do so. Yet the Court of Appeals reversed the trial court's grant of summary disposition on Plaintiff's negligent retention theory against Ford, finding that questions of fact required a jury trial on whether Ford had "notice" based on the misdemeanor conviction and several female employees' complaints of Mr. Bennett's behavior, thereby generating a further "issue of fact regarding whether Ford negligently retained Bennett as a supervisor." (Apx 19a-20a). In other words, the Court of Appeals held that the question of whether Ford owed a legal duty to Plaintiff was a jury-submissible question.

The Court of Appeals' expansion of a negligent retention cause of action conflicts with existing remedies under the Elliott-Larsen Civil Rights Act, as well as with longstanding negligence principles and public policy, warranting reversal by this Court. On this basis, Ford requests that the Court reverse the Court of Appeals' ruling on Plaintiff's negligent retention claim and reinstate the trial court's order of summary disposition in its entirety.

II. STATEMENT OF THE CASE

Plaintiff relied on sensationalist tactics with the trial court, the media, and the Court of Appeals -- and can be expected to do so with this Court -- to distract attention from the real issues in her Complaint against Ford. Unfortunately, these tactics succeeded in diverting the Court of Appeals from the record evidence and legal issues

involved in this case. Plaintiff's hyperbole, distortion of the record, obfuscation of longstanding bedrock principles, and misrepresentation of the law to assert that a claim of negligent retention is distinct from a claim of sexual harassment, cajoled the Court of Appeals into creating a new cause of action superimposed on a sexual harassment claim. The theory advanced by Plaintiff and adopted by the Court of Appeals represents a cause of action wholly inconsistent with Michigan law, which confuses and undermines the jurisprudence of our State. The pertinent facts, cleansed of Plaintiff's sensationalism and obfuscation, follow.

A. Factual Background.

On or about January 15, 1998, Plaintiff applied for work with AVI Food Systems ("AVI"), the contractor that operates cafeterias at Ford's Wixom Assembly Plant (Apx 215a, 233a, 239a, 244a). The Wixom Plant is a huge manufacturing facility where thousands of Ford employees (and employees of other employers) work. Plaintiff applied for whatever jobs AVI might have available, whether at the Wixom Plant or at other non-Ford facilities that contracted with AVI in the same general vicinity. (Apx 233a-234a, 236a-239a, 244a).

AVI offered Plaintiff a cashier's position in its Wixom Plant operation, and Plaintiff began working for AVI on March 9, 1998. (Apx 208a-209a, 218a). As an AVI employee, Plaintiff had the protections offered by her collective bargaining representative, Union Local 1064, AFL-CIO, pursuant to a contract negotiated between AVI and Local 1064. AVI also had its own policies and procedures, including a policy prohibiting sexual harassment and setting out procedures for investigating and remedying sexual harassment complaints. (Apx 173a, 198a, 209a-215a, 221a-224a, 234a-235a, 243a, 244a, 249a).

Plaintiff worked in three cafeterias at the Wixom Plant utilized primarily by Ford hourly workers. AVI controlled access to these cafeterias. AVI opened these cafeterias for two one-hour break periods per shift. During these break periods, AVI did not restrict entry to Ford employees. Rather, any individual on the Wixom Plant premises (e.g., Ford hourly and salaried employees, vendors, other contractors' employees, government auditors, and guests) had access to the cafeterias. AVI prohibited non-AVI employees from entering the cafeterias at any time other than during the scheduled break times; at all other times, AVI locked the cafeteria doors. AVI also prohibited non-AVI employees from entering the non-customer areas of the cafeterias (i.e., the kitchens and stockrooms) at any time. While Plaintiff occasionally witnessed non-AVI employees violate this prohibition, she did not notify AVI (at least not until 2001), nor was there evidence that AVI or Ford was otherwise aware of any violations of AVI's access prohibition. (Apx 178a-186a, 238a-239a).

In April 1998, the month after Plaintiff began her employment with AVI, Plaintiff had her first experience with AVI's policy and procedures for investigating and remedying allegations of sexual harassment. At that time, Plaintiff submitted a written statement to AVI detailing allegations of sexual misconduct by a cleaning contractor's employee working at the Wixom Plant. Following an investigation, AVI had the contractor's employee, who had been assigned to clean the cafeteria floors, permanently removed from the AVI premises. (Apx 240a-242a, 278a-280a).

In the fall of 1998, Plaintiff allegedly had her second experience. This alleged experience spanned a three-week period. According to Plaintiff, Mr. Bennett, then a Ford superintendent at the Wixom Plant, briefly chatted with her at her cashier station in

"Café 2" on three or possibly four occasions. During these brief chats, Mr. Bennett allegedly asked Plaintiff to meet him after work at a Taco Bell.[2] Plaintiff declined each invitation in a good-natured way. Plaintiff testified that Mr. Bennett was polite and did not use sexual or foul language. Plaintiff was certain no one overheard Mr. Bennett's invitations, even though these chats occurred during break times when the cafeteria was open and others were around. As Plaintiff explained these exchanges, Mr. Bennett asked her to meet him after work; she said no; he asked a couple more times, apparently thinking the original invitation simply had been for an inconvenient time; Plaintiff's response was to "sort of laugh" and again decline. (Apx 189a-190a, 199a-205a).

Plaintiff testified that these brief and polite exchanges were followed by two more serious encounters with Mr. Bennett, occurring a few days apart. On both of these occasions, Mr. Bennett allegedly entered the AVI stockroom or kitchen adjoining Café 2, violating AVI's prohibition on entering its kitchens or stockrooms at any time, and either kissed or attempted to kiss Plaintiff. Plaintiff also claims Mr. Bennett asked if they could have sex, to which she said no. She rebuffed him, and went back to work. There were no witnesses, and Plaintiff had no further interaction with Mr. Bennett at any time. (Apx 187a-188a, 208a).

Plaintiff was unsure of the timing of these alleged encounters with Mr. Bennett. In her Complaint and First Amended Complaint, Plaintiff alleged these events occurred in September 1998. (Apx 56a, 288a). In her deposition, she testified that she believed

[2] Mr. Bennett denies any such invitations or any other improper conduct towards Plaintiff. However, for purposes of Defendants' motion for summary disposition, Defendants treated Plaintiff's allegations as if they were true.

all of her interaction with Mr. Bennett occurred sometime before emergency dental surgery she had in November 1998; on the other hand, she "seemed to remember" the events happening close to Thanksgiving, i.e., November 26, 1998. Plaintiff was not really sure which interactions with Mr. Bennett occurred first, i.e., the three or four invitations to Taco Bell or the two kissing episodes. What can definitively be concluded from her testimony is that she can do no more than guess or speculate about when and in what order the encounters occurred, apart from her "fall of 1998" generalization. (Apx 166a-167a, 189a-193a, 206a, 208a, 216a, 246a-248a, 275a). Plaintiff never reported the alleged encounters with Mr. Bennett to AVI or Ford until she filed this lawsuit three years later in September 2001. (Apx 175a-177a, 193a-197a, 393a)

When Plaintiff finally sued in September 2001, it was at the solicitation of Justine Maldonado and Ms. Maldonado's attorneys who then became Plaintiff's attorneys. (Apx 57a-58a, 164a, 170a-172a). Ms. Maldonado was a Ford Wixom Plant hourly worker who had filed her own suit against these Defendants in June 2000, Maldonado v Ford Motor Company and Daniel P. Bennett, Wayne County Circuit Court No. 00-018619-NO.[3] (Apx 164a-165a, 168a-172a). AVI, upon learning of Plaintiff's complaint in fall 2001, followed its policy and procedures prohibiting sexual harassment, undertaking an investigation into her allegations. (Apx 175a-177a, 229a-232a, 275a). At that time, Mr. Bennett had not had any contact with Plaintiff in three years and had not worked at the

[3] Ms. Maldonado's and Plaintiff's lawsuits were both dismissed by the respective trial courts in August 2002. Despite its order to the contrary (Apx 39a), the Court of Appeals combined Plaintiff's and Ms. Maldonado's appeals for purposes of oral argument. The Court of Appeals panel filed unpublished opinions in both cases on April 22, 2004. (Apx 17a-23a, 40a-53a). At this filing, Ford is awaiting oral argument before this Court on whether it will grant Ford's application for leave in Ms. Maldonado's case or take other peremptory action. (12/28/04 Order, SC No. 126274).

Wixom Plant (or any other Ford facility) for over a year. (Apx 199a).

With respect to Plaintiff's claim that Ford negligently retained Mr. Bennett as an employee, Plaintiff claimed that Ford had a duty to discharge Mr. Bennett upon learning in 1995 that he had been convicted of a misdemeanor offense. (Apx 83a). The misdemeanor offense with which he had been charged (and eventually convicted), MCL 750.335a; MSA 28.567(1), was not an offense that placed Mr. Bennett on the sex offenders' registry or required notification to individuals Mr. Bennett was likely to encounter (e.g., his neighbors), nor was it intended to stigmatize Mr. Bennett as an habitual offender. MCL 28.722(d)(iii); MSA 4.475(2)(d)(iii). The offense involved no physical contact by Mr. Bennett, who was convicted for exposing himself in his car while passing another vehicle. (Apx 82a, 162a). At the time of the 1995 misdemeanor conviction, Mr. Bennett had been employed by Ford for six years, first as a supervisor, then as a superintendent. He had an excellent work record and there had never been any hint of a problem with him in the workplace, at least as of the fall of 1998 when Plaintiff claims her encounters with him occurred. (Apx 115a-116a, 124a). Mr. Bennett served his sentence (which involved probation and community service) and continued to do his job at Ford without incident. In November 2001, the district court that had convicted and sentenced Mr. Bennett ordered the conviction expunged. (Apx 78a, 84a).

In an effort to avoid summary disposition, and in the Court of Appeals, Plaintiff tried to embellish her case by obscuring her inability to identify the timing or sequence of her alleged encounters with Mr. Bennett. Plaintiff argued that Ford knew more about alleged misconduct involving Mr. Bennett than it actually did, on the notion that Ms. Maldonado had supposedly complained to Ford about Mr. Bennett in late October 1998,

ostensibly before Mr. Bennett approached Plaintiff. According to Plaintiff, if Ford did not have a duty to fire Mr. Bennett in 1995 because of the misdemeanor conviction, it certainly did have a duty in late October 1998 when Ms. Maldonado allegedly complained. There are a number of fallacies in Plaintiff's position, but the dispositive one is that there was no evidence that Ms. Maldonado actually complained to anyone before Plaintiff's alleged encounters with Mr. Bennett. There was just Plaintiff's own contradictory speculation and guessing that the encounters may have taken place in November 1998, as opposed to October 1998, or even September 1998 as she alleged in her Complaints and as she otherwise believed when trying to place the events in the context of other significant events that occurred in the same timeframe.[4] (Apx 56a, 166a-167a, 189a-193a, 206a, 208a, 216a, 246a-248a, 275a, 288a).

Plaintiff also tried to generate confusion regarding this notice and timing issue by referencing alleged complaints of other Ford employees about Mr. Bennett. These complaints have been well documented in other lawsuits against Defendants, brought by Ford hourly workers Lula Elezovic, Elezovic v Ford Motor Company and Daniel P. Bennett, Wayne County Circuit Court No. 99-934515-NO, and Pamela Perez, Perez v Ford Motor Company and Daniel P. Bennett, Wayne County Circuit Court No. 01-134649-CL. In Ms. Elezovic's lawsuit, the Honorable Kathleen MacDonald ruled as a matter of law, after a three-week trial, that Ms. Elezovic did not notify Ford of Mr. Bennett's alleged misconduct until November 1999. Judge MacDonald dismissed the lawsuit for lack of timely notice, and the Court of Appeals affirmed. Elezovic v Ford

[4] A myriad of other problems exist with Plaintiff's position, which are detailed in the pertinent legal discussions in this Brief. Suffice it to say, Plaintiff felt unconstrained by the factual record in this matter or by the evidentiary standards applicable for summary disposition in arguing her positions below.

Motor Co, 259 Mich App 187, 193-197; 673 NW2d 776, *special panel not convened*, 259 Mich App 801; 677 NW2d 378 (2003).[5] It is undisputed that Ms. Elezovic's complaint was the earliest of these "other complaints." Accordingly, any reliance on complaints about Mr. Bennett by Ford employees is unsupported and improper.

B. Proceedings In The Circuit Court.

On September 28, 2001, Plaintiff served Ford with her two-count complaint in this matter, alleging (1) that Ford and Mr. Bennett violated the Elliott-Larsen Civil Rights Act by subjecting her to a sexually hostile work environment; and (2) that Ford negligently retained Mr. Bennett after his 1995 misdemeanor conviction. Plaintiff and her counsel had forewarned the media of this Complaint in a press release. (Apx 72a-73a). The Complaint, like the press release, was filled with gratuitous and inflammatory references to Mr. Bennett's misdemeanor conviction, even though Plaintiff's counsel knew by then that the conviction had been ruled inadmissible in both Ms. Elezovic's case and Ms. Maldonado's case (in which Plaintiff's counsel was representing Ms. Maldonado). Plaintiff's counsel also knew Ms. Maldonado's case was to go to trial soon. (Apx 59a-61a, 65a, 70a-72a, 102a-103a, 400a-408a). Mr. Bennett filed a motion to strike the conviction references from the Complaint. (Apx 57a-67a). The trial court granted the motion to strike by opinion and order dated December 26, 2001. (Apx 24a-33a). In the meantime, by an order dated November 9, 2001, the district court that had convicted and sentenced Mr. Bennett expunged the conviction (Apx 78a, 84a).

On May 17, 2002, Defendants filed a joint motion for summary disposition. (Apx 129a-160a, 313a-324a, 373a-382a). With regard to the Elliott-Larsen claim, Defendants

[5] This Court granted Ms. Elezovic's application for leave, SC No. 125166, and held oral argument in the case on December 8, 2004.

argued that (1) they were not Plaintiff's "employer" for purposes of Elliott-Larsen; (2) Plaintiff failed to provide actual or constructive notice of an alleged hostile work environment under Elliott-Larsen; and (3) the conduct alleged by Plaintiff was not "severe or pervasive" as a matter of law. The trial court, the Honorable Wendy L. Potts, agreed that neither Ford nor Mr. Bennett was Plaintiff's "employer" under Elliott-Larsen (AVI was her employer) and that, in any event, Plaintiff had failed to provide notice of an alleged hostile work environment. Having so ruled, the trial court did not reach the "severe or pervasive" conduct issue. (Apx 6a-9a, 13a-14a).

With regard to Plaintiff's negligent retention claim, Ford argued in its summary disposition motion that Michigan law did not recognize this cause of action. Ford alternatively argued that if it was recognized, the theory was not as encompassing or available in this setting as Plaintiff claimed. Ford asserted that, based on the context and character of Plaintiff's negligent retention claim, the standard under Elliott-Larsen must apply. Ford further contended that Plaintiff had not stated facts sufficient to give rise to a duty in negligence to terminate Mr. Bennett's employment before the events Plaintiff complained of in her suit. The trial court agreed that, to the extent such a claim existed, Plaintiff had not submitted evidence that Ford had notice of any facts that would give rise to a duty in negligence. (Apx 9a-10a, 14a-16a).

Plaintiff filed a motion for reconsideration of the trial court's opinion and order granting summary disposition to both Defendants. The trial court denied the motion for reconsideration by its opinion and order dated August 27, 2002. (Apx 36a-38a).

C. Proceedings In The Court Of Appeals.

On appeal, Plaintiff challenged the trial court's grant of summary disposition as to both counts – Elliott-Larsen and negligent retention -- and also challenged the trial

court's opinion and order striking references to Mr. Bennett's conviction. In a *per curiam* unpublished opinion, the Court of Appeals (Borello, P.J., White and Smolenski, J.J.) affirmed the trial court with respect to the opinion and order striking the conviction references and as to summary disposition on Plaintiff's Elliott-Larsen claim. However, with regard to Plaintiff's negligent retention claim, the Court of Appeals reversed.

Relying on this Court's opinion in Hersh v Kentfield Builders Inc, 385 Mich 410; 189 NW2d 286 (1971), the appellate panel held that Mr. Bennett's 1995 misdemeanor conviction for off-premises, off-duty conduct with strangers should have put Ford on notice that Mr. Bennett had a propensity to engage in "sexually derogatory behavior toward female employees." (Apx 19a). In conjunction with the conviction, the panel relied on Plaintiff's argument that "a number of Ford employees came forward with claims of Bennett sexually harassing them," even though Plaintiff presented no evidence of a single such complaint to Ford prior to her alleged encounters with Mr. Bennett in the fall of 1998. (Id). It is undisputed that the Ford employees who complained to Ford about Mr. Bennett did so after Plaintiff's alleged encounters with him.

It is this extraordinary and unwarranted expansion of Hersh -- imposing a duty on Ford in the absence of knowledge, actual or constructive, of any allegation of workplace sexual misconduct involving Mr. Bennett -- that is the subject of this appeal. The Court of Appeals' decision imposes on employers a duty to provide greater protection against sexual harassment to non-employees than Elliott-Larsen does with respect to employees. If allowed to stand, the Court of Appeals' holding would create liability for employers under a negligent retention theory in circumstances wholly beyond and

inconsistent with those contemplated in Hersh. It would also superimpose an amorphous tort theory on a sexual harassment claim without applying procedural and substantive rules established for workplace harassment claims by this Court and the Michigan Legislature. The Court of Appeals' ruling would also have the unavoidable consequence of eviscerating the strong public policy favoring rehabilitation of first-time offenders – thereby rendering even one-time misdemeanor offenders unemployable.

III. ANALYSIS

A. The Court of Appeals' Creation Of A Common Law Cause Of Action For "Negligent Retention" For Workplace Sexual Harassment Violates Basic Negligence Principles And Contravenes Legislative Intent And MRE 404(b).

Summary Of The Argument

The trial court granted summary disposition on Plaintiff's negligent retention claim, a ruling this Court, like the Court of Appeals, reviews *de novo*. MacDonald v PKT Inc, 464 Mich 322, 332; 628 NW2d 33 (2001). The trial court held that, to the extent Michigan has recognized a negligent retention cause of action, Plaintiff had not submitted evidence that Ford had notice that would give rise to a duty in negligence.

In remanding Plaintiff's Complaint for further proceedings on her negligent retention claim, the Court of Appeals relied entirely on this Court's opinion in Hersh v Kentfield Builders Inc, supra, 385 Mich 410. In Hersh, this Court held that whether an employer knew or should have known of an employee's "vicious propensities" was a jury question. 385 Mich at 415. The Court of Appeals' reliance on Hersh requires reversal for three reasons.

First, rather than applying it, the Court of Appeals expanded Hersh beyond its intended reach. If Hersh delegated to the jury the issue of whether an employer should

be liable for the criminal acts of its employees, as the Court of Appeals held, the result is erroneous and should be overruled. The existence of a duty is always a question for the Court. To the extent Hersh imposed a duty on the employer in that case, the duty does not extend to an individual like Plaintiff here, nor is the employment relationship the proximate cause of her claimed injury. The Court of Appeals distorted basic negligence principles involving duty, reasonable care, and proximate cause to impose on employers a virtually limitless duty to unforeseeable plaintiffs that would render even first-time misdemeanor offenders unemployable.

Second, the "propensity" Plaintiff claims in this case does not involve violent behavior such as the conduct before the Court in Hersh. Rather, it involves alleged sexual harassment, conduct defined and prohibited for the first time in this State by the Michigan Legislature in the Elliott-Larsen Civil Rights Act. Plaintiff was an "employee" of an "employer" – her employer was AVI -- for purposes of Elliott-Larsen. AVI controlled Plaintiff's workplace and had a statutory duty to investigate and provide a remedy if one of its employees gave notice that she was being subjected to a sexually hostile work environment. Recognition of a parallel common law cause of action where the Legislature has provided a statutory remedy is contrary to legislative intent. This common law cause of action would displace Elliott-Larsen's requirements that an employee give notice and experience severe and pervasive conduct -- neither of which were satisfied here.

Third, Hersh pre-dated the Michigan Rules of Evidence. Present reliance on Hersh as requiring admission of "propensity" evidence, and, more particularly, treating "propensity" evidence as a jury question, would be inconsistent with MRE 404's caveats

on the admission of such evidence, and with MRE 403's balancing of probative value versus undue prejudice.

The Court of Appeals' opinion crystallizes these conflicts. The net result is the recognition of a legal theory that in addition to contravening longstanding legal principles, far exceeds the scope of any recognized claim.

1. The Court Of Appeals Erred In Allowing A Negligent Retention Cause of Action That Goes Far Beyond Any Judicially Recognized Claim.

Plaintiff argued below that Hersh required Ford to fire Mr. Bennett because of his misdemeanor conviction -- or be found liable in negligence. The Court of Appeals held that, in conjunction with employee claims as to which there were issues of fact, Mr. Bennett's conviction presented a jury question as to "whether Ford knew or should have known of Bennett's sexually derogatory behavior toward female employees." (Apx 19a).

As an initial matter, if Hersh can really be interpreted as the Court of Appeals and Plaintiff interpret it, this Court should clarify or limit it, or simply overrule it. The salient facts in Hersh were that the employee in question, Mr. Hutchinson, in the course of performing duties assigned to him by the employer and while on the employer's premises, came in contact with one of his employer's vendors. Without provocation, Mr. Hutchinson assaulted and seriously injured the vendor. Mr. Hutchinson was a repeat offender of crimes involving violent assault, having been in prison on account of at least two felony convictions, one of which was for manslaughter.

On these facts, this Court relied on general treatise language to assume the employer might have owed the vendor a legal duty:

> "§ 9. Negligence; selection or retention of employee. . . a duty imposed upon an employer who invites the general public to his premises, and whose employees are brought

> into contact with the members of such public in the course of the master's business, is that of exercising reasonable care for the safety of his customers, patrons, or other invitees."

Hersh, 385 Mich at 412, quoting 34 ALR2d 390 § 9. Having taken this step, what the Court did next is not consistent with basic negligence principles. It turned the question of whether a legal duty existed over to a jury: "[w]hether the employer knew or should have known of [the employee's] vicious propensities should not be determined by any court as a matter of law, but by the jury." 385 Mich at 415. Indeed, the Court further delegated to the jury the responsibility, which belongs to a court, to weigh public policy considerations in determining whether a duty should be imposed. 385 Mich at 415-416. It was this delegation that the Court of Appeals here uncritically transferred to the very different factual circumstances of this case. It was error to do so.

It is elementary that, to prove negligence (including negligent retention), a plaintiff has to establish all of the following elements:

> (1) the defendant must have owed a legal duty to the plaintiff; (2) the defendant must have breached the duty owed; (3) there must have been a proximate causal relationship between the breach of such duty and the injury to the plaintiff; and (4) the plaintiff must have suffered damages.

Marcelletti v Bathani, 198 Mich App 655, 658; 500 NW2d 124, lv den, 443 Mich 860; 505 NW2d 582 (1993), citing Lorencz v Ford Motor Co, 439 Mich 370, 375; 483 NW2d 844 (1992).

Whether a duty exists to a particular plaintiff is a question for the court. Williams v Cunningham Drug Stores Inc, 429 Mich 495, 500; 418 NW2d 381 (1988). Existence of a legal duty "is actually a question of whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relationship

between individuals which imposes upon one a legal obligation for the benefit of the other. . . Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Buczkowski v McKay, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (emphasis added and internal citations and quotations omitted). Among the variables that must be factored into a court's determination of whether a duty to a particular plaintiff existed are:

> Foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach.

Id, 441 Mich App at 101 n4, citing Prosser & Keeton, Torts (5th ed) § 53, p 359, n 24. Accord, Murdock v Higgins, 454 Mich 46, 53; 559 NW2d 639 (1997).

Only after the Court finds that a duty exists may a jury determine whether, on the particular facts of the case, the duty was breached. Moreover, where "overriding public policy concerns" exist, the question of whether the defendant failed to exercise "reasonable care," i.e., breached a duty the court found to exist, is also for the court, not for a jury, to determine. Cunningham, 429 Mich at 500-501. Accord MacDonald v PKI, supra, 464 Mich at 336.

Neither the Court of Appeals in this case nor this Court in Hersh analyzed the prerequisites to imposing a duty to determine whether a legal duty existed on the facts before them. Neither analyzed and balanced foreseeability, certainty of harm, the connection between the prior conduct and the injury, moral blame, or the consequences of imposing a duty and liability. Buczkowski, 441 Mich at 101 n4. Rather, both relied on

general treatise language to assume that, because a legal duty might or might not exist, it was a question for the jury. Hersh, 385 Mich at 415; McClements (Apx 19a).

The Court of Appeals' uncritical reliance on Hersh to find a jury-submissible issue is alarming. Despite this Court's agreement in Hersh that "the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public," this Court held it was proper to entrust to the jury the determination of a duty based solely on Mr. Hutchinson's felony convictions. Id at 415. Hersh also had far more egregious facts, including felony convictions for conduct nearly identical to that later inflicted on the employer's vendor. Even if Hersh were consistent with negligence law, how can Mr. Hutchinson's multiple felony convictions and imprisonment for violent crimes similar to his assault in the workplace be equated with Mr. Bennett's single misdemeanor conviction? This question is especially troubling where, as here, the conduct underlying the conviction is materially dissimilar to the harm subsequently alleged in this case. (Apx 80a, 82a). A much tighter evidentiary linkage must exist and a more meaningful analysis must occur before a legal duty of this nature can be imposed.

Imposing a legal duty on Ford under a negligent retention theory in this case would run afoul of public policy concerns favoring rehabilitation of first-time misdemeanor offenders, particularly one who has served his sentence and completed his probation. Hersh cannot be read, and should not be extended, to permit a jury to weigh and assimilate such "overriding public policy concerns." Cunningham, supra, 429 Mich at 500, 501. To do so would sound the death knell for the vital public policy that

first-time misdemeanor offenders should be rehabilitated, not sentenced to a life of unemployability.

As other negligent retention cases make clear, a legal duty cannot be imposed in the absence of balancing all factors pertinent to imposing a duty. For example, in Yunker v Honeywell Inc, 496 NW2d 419, 422-424 (Minn App), review den (Minn 1993), an employer re-hired an employee after that employee had completed a prison sentence for strangling a co-worker. 496 NW2d at 421. Approximately four years after his re-hire, and following several bouts of increasingly confrontational behavior in the workplace, the employee killed another co-worker. Id. On these facts, the court held that the prior felony conviction was not notice sufficient to impose a legal duty. 496 NW2d at 422-423. As the court explained, to impose this liability based on a single prior conviction would be to "essentially hold that ex-felons are inherently dangerous and that any harmful acts they commit against persons encountered through employment will automatically be considered foreseeable." 496 NW2d at 423. Finding that this standard would create an insurmountable obstacle to those who have paid their debt to society, the court explained that public policy mandates otherwise: "Such a rule would deter employers from hiring workers with a criminal record and 'offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can be assimilated into the community.'" Id. See also Coughlin v Titus & Bean Graphics Inc, 54 Mass App 633, 640 n10; 767 NE2d 106 (2002) ("very fact of being placed on probation . . . imports a professional judgment . . . that the probationer . . . does not represent a risk to society . . . . In the absence of specific events. . . it is hardly reasonable to expect [an employer] to anticipate perils that responsible state institutions

and qualified personnel have not anticipated"), lv den, 437 Mass 1105; 772 NE2d 590 (2002); Ford v Gildin, 613 NYS2d 139, 142; 200 AD2d 224 (NY 1994) (refusing to hold that conviction for even a violent crime should be bar to employment, stating: "Such a precedent would effectively compel any employer to deny employment to anyone who was ever convicted of a violent crime, contrary to the public policy [under New York law], since the employer would upon such hiring face potentially catastrophic liability for any crime committed by that employee which was even minimally connected to the place of his employment").

In this case, Mr. Bennett served the sentence and completed the probation imposed on him by the convicting court. The same court ultimately ordered Mr. Bennett's misdemeanor conviction expunged and his record cleared. (Apx 84a). See MCL 780.622; MSA 28.1274(102) (Mr. Bennett "for purposes of the law, shall be considered not to have been previously convicted"). In ordering the expungement, the court determined it to be "consistent with the public welfare." MCL 780.621(9); MSA 28.1274 (101)(9). To impose liability in negligence on these facts would surely deter any employer from hiring Mr. Bennett or any other first-time misdemeanor offender, despite the fact he paid his debt to society. Yunker, 496 NW2d at 423.

The Yunker court offered further guidance as to precisely what conduct may place an employer on notice that its employee may have a "propensity" for violence or similar dangerous conduct sufficient to give rise to a legal duty. There, it was not the employee's prior felony conviction, even when combined with an incident of inappropriate workplace behavior, but rather a series of violent episodes in the workplace. Specifically, after his re-hire, the employee threatened to kill two co-workers

(including the one he eventually murdered), challenged another co-worker to fight, and behaved in an abusive manner toward several other employees. It was this "troubled work history and the escalation of abusive behavior" in the weeks leading up to the murder -- not the prior conviction -- that supported imposing liability under a negligent retention theory. 496 NW2d at 424.

Unlike the employees in Hersh and Yunker, Mr. Bennett was not a felon (much less a repeat felon) and had never spent time in prison. As of fall 1998, Ford's knowledge of any negative behavior by Mr. Bennett was limited to his 1995 misdemeanor conviction. The conviction did not occur on Ford premises, did not involve Ford employees or others employed at or even visiting the Wixom Plant, and did not occur on work time. Rather, the conviction involved off-duty, off-premises conduct with strangers while driving on I-275. The misdemeanor was not one that the law recognizes as a "propensity" crime, such as a habitual offender offense or sex offender registry provisions. It did not involve forced kissing or even any physical contact of any kind, so as to give rise to any expectation Mr. Bennett had a propensity to forcibly attempt to kiss anyone. (Apx 80a, 82a, 162a). For ten years spanning the period before and after the 1995 conviction, there had never been a complaint or even an inference that Mr. Bennett had engaged in sexually inappropriate workplace misconduct. (Apx 115a-116a, 124a). Simply put, as of the fall of 1998, when Plaintiff claims Mr. Bennett kissed or attempted to kiss her, nothing in Mr. Bennett's record suggested that he had a "propensity" to do anything at work other than his job.

As this Court has held, it may not impose an "inevitably vague" duty. Cunningham, supra, 429 Mich at 502. Rather, the employer "must be able to ascertain

in advance the extent of [its] duty and whether [it] has fulfilled it." Id at 502-503. The only way Ford could have fulfilled the amorphous duty Plaintiff seeks to impose here would have been to fire Mr. Bennett upon learning of the misdemeanor conviction. Plaintiff's contention that Ford had a duty to discharge Mr. Bennett based on this single misdemeanor, inconsistent as it was with what was known by Ford during his ten years in Ford supervision, was properly rejected by the trial court and should likewise have been rejected by the Court of Appeals. Neither Hersh nor any other reported negligent retention case even approaches such a sweeping indictment. As a matter of policy, Michigan should not be the genesis of a cause of action that stigmatizes one-time misdemeanor offenders and imposes insurmountable obstacles to their future employment. As this Court observed under similar circumstances, the recognition of the duty Plaintiff advocates would be "misbegotten." MacDonald v PKI Inc, supra, 464 Mich at 335.

2. There Can Be No Duty Or Breach Because Harm To Plaintiff Was Not Foreseeable.

The fact that Ford employed Mr. Bennett cannot, without more, impose liability on Ford in negligence, other than under *respondeat superior* principles. See Baugher v A Hattersley & Sons Inc, 436 NE2d 126, 128 (Ind App, 1982) ("'the mere existence of the employer-employee relationship does not entitle a third person to seek recovery for injuries inflicted by the employee on the theory of negligence in hiring'"). See also Buzckowski v McKay, supra, 441 Mich at 100 ("Duty is actually a question of whether the defendant is under any obligation for the benefit of the particular plaintiff") (internal quotation omitted). Even if an employee is found to have a "propensity," the type of harm to a particular plaintiff must be foreseeable before any duty can arise. In this

case, nothing made it foreseeable to Ford that Mr. Bennett would, by virtue of a 1995 misdemeanor conviction for off-premises misconduct involving strangers he passed in an automobile, attempt to forcibly kiss a woman in her workplace three years later. (Apx 80a, 82a, 162a).

The general "duty" this Court alluded to in Hersh, supra, included the requirement that the type of harm be foreseeable to the particular plaintiff. The unfit employee had to be "'brought into contact with the members of [the] public in the course of the master's business.'" Hersh, 385 Mich at 412, quoting ALR2d 390 § 9. Indeed, Mr. Hutchinson, the unfit employee, was on his employer's premises performing his employer's business when the unprovoked assault on the vendor occurred. Id at 411. In analyzing a negligent retention claim, "[t]he employer's duty . . . is limited to foreseeable victims, and then only 'to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.'" Crisman v Pierce County Fire Protection Dist No 21, 115 Wash App 16, 20; 60 P3d 652 (2002) (citations omitted). See also Premo v General Motors, 210 Mich App 121, 124-125; 533 NW2d 332 (1995) (employer owed no duty to a plaintiff injured by its intoxicated employee in auto accident where accident was not on employer's premises).

Michigan and other jurisdictions have strictly enforced this foreseeability requirement. For example, in Murdock v Higgins, supra, the Court analyzed the claim of a youth volunteer sexually assaulted by his supervisor. The supervisor had been known to frequent local parks where he picked up young men. On these facts, the Court held the defendant owed no duty because harm to the particular plaintiff was not foreseeable. 454 Mich at 58. The defendant's knowledge that an employee had

engaged in improper off-premises conduct with strangers did not make it foreseeable that he "posed a threat to those with whom he worked." Id at 59.

In Coughlin v Titus & Bean Graphics, supra, a father sued an employer for negligence when his daughter was murdered on the employer's premises by an unsupervised employee. At the time of the murder, the employer knew that this employee "had been in prison for fourteen years for committing a violent crime" including breaking the ribs, nose and cheek of a female police officer. 54 Mass App at 637. The employer did not know, because it did not check further into the employee's background, that the employee had spent most of his incarceration in a treatment center for sexually dangerous persons. Id at 636-637. Even in these unfortunate and compelling circumstances, the court concluded the employer did not have a legal duty to the murder victim. The victim lived near the employer's premises and encountered the employee as he sat outside those premises. The two started talking; the employee offered to show her his workplace; once inside, he murdered her. Id at 637-638. Because it was not expected that the employee – as part of his job -- would have regular contact with nearby residents like the victim, the court held that the harm to the victim was not foreseeable. Id at 640-641.

Similarly, in Connes v Molalla Transport Sys Inc, 831 P2d 1316 (Colo 1992), the court examined the question of whether a truck driver's employer owed a duty to a hotel clerk who was sexually assaulted by the driver. The court held no duty existed, in part because the hotel clerk was not among those individuals with whom it would be anticipated the driver would be in "close contact . . . as a result of a special relationship between the individuals and the employer." Id at 1321. To the contrary, the truck driver

"was not authorized to stop at a hotel nor would he be reimbursed for any lodging expenses." Connes v Molalla Transport Sys Inc, 817 P2d 567 (Colo App 1991). The hotel clerk was not among a class of foreseeable victims, nor was Plaintiff here.

Other courts have treated the question here not as one of duty to a particular plaintiff, but rather as of one of absence of proximate cause. In other words, if there was a duty, there was no breach. See e.g. Carter v Skokie Valley Detective Agency Ltd, 256 Ill App3d 77, 82-83; 628 NE2d 602 (1993) (employment relationship was not proximate cause of plaintiff's injuries and death; "employment merely furnished the condition" that introduced plaintiff to her murderer), lv den, 155 Ill2d 562; 633 NE2d 2 (1994). Whether analyzed as a question of duty or one of breach, it is – under the circumstances here – for the Court to decide. Id. See also, Williams v Cunningham, supra, 429 Mich at 500-501 (court should decide breach where there are "overriding public policy concerns").

It was not foreseeable to Ford that Mr. Bennett was likely to be in a position as part of his job duties to forcibly kiss Plaintiff or any other AVI employee. Mr. Bennett was not in an AVI stockroom because of any "task, premise or instrumentality" entrusted to him by Ford. To the contrary, if he was there, he was trespassing. AVI controlled access to Plaintiff's workplace and prohibited Mr. Bennett and all other non-AVI employees from entering its stockrooms and kitchens. (Apx 184a-185a).[6] Only during the one-hour break periods when the cafeterias were open was any Ford (or other non-AVI) employee to be in contact with an AVI employee, and during break periods there

[6] While Plaintiff claims that some non-AVI employees disregarded AVI's prohibition, she presented no evidence that anyone reported violations to AVI or to Ford. She admittedly did not, at least until 2001, three years after Plaintiff's purported encounters with Mr. Bennett. (Id).

were invariably many employees of Ford, AVI, vendors, and other contractors around, as well as anyone else who happened to be on the Wixom Plant premises, whether they were government auditors, friends or family of workers, or other guests. (Apx 201a-203a).

Nor was taking a coffee break in an AVI cafeteria among the "tasks" Ford entrusted to Mr. Bennett. While Mr. Bennett could spend his non-work time in an AVI cafeteria if it was open, he could also go to the Burger King outside the Wixom plant gates or anywhere else he chose. Plaintiff, as an employee of a cafeteria where Mr. Bennett sometimes had lunch, was no more in any arguable zone of risk created by Ford's knowledge of Mr. Bennett's conviction than employees of Burger King or Opus One. If Mr. Bennett engaged in the misconduct Plaintiff alleged, he could only have done so by trespassing. Because it was not foreseeable that Mr. Bennett's performance of the tasks assigned to him by Ford would create the risk he would forcibly kiss Plaintiff on her employer's premises, no duty arose here.

3. The Elliott-Larsen Act Provides The Exclusive Remedy For Workplace Sexual Misconduct.

Plaintiff's interpretation of Hersh also cannot be squared with the Elliott-Larsen Civil Rights Act, passed in 1977, which provides the exclusive remedy for workplace sexual misconduct. In suing Ford and Mr. Bennett under that statute, Plaintiff conceded that she considered Mr. Bennett's alleged conduct to be sexual harassment prohibited by Elliott-Larsen. (Apx 391a). The trial court dismissed Plaintiff's Elliott-Larsen claim, and the Court of Appeals affirmed the dismissal, but not because the alleged conduct did not fall within the statute -- it was because neither Ford nor Mr. Bennett was Plaintiff's "employer" for purposes of Elliott-Larsen. (Apx 13a).

Plaintiff had an "employer" subject to Elliott-Larsen against which she could have pursued a remedy under Elliott-Larsen for Mr. Bennett's alleged sexual misconduct. AVI certainly had a duty to take action upon notice that one of its employees was being sexually harassed in the AVI workplace, whether the accused was an AVI co-worker or a customer like Mr. Bennett. See Schlinker & Payok, The Customer Is Not Always Right, 84 Mich Bar J, 30-31 (2005) ("it appears to be settled law that employers are responsible for harassment by non-employees and independent contractors under Title VII").

AVI had a policy and procedures in place for reporting and investigating sexual harassment, something Plaintiff had successfully used in the past when another Wixom Plant contractor's employee engaged in sexually inappropriate conduct. (Apx 198a, 234a-235a, 240a-244a, 278a-280a). For whatever reason, in this situation, Plaintiff chose not to pursue the statutory remedy Plaintiff had against AVI, or even to use AVI's complaint procedure. She may not avoid the consequences of her election by pursuing a common law remedy that the Legislature, in prohibiting sexual misconduct in the workplace through Elliott-Larsen, did not intend to be part of Michigan's remedial scheme.

"'It is a well established principle of law, that where a statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued, and a party seeking the remedy is confined to that remedy, and that only.'" Lafayette Transfer & Storage Co v Michigan Public Utilities Comm'n, 287 Mich 488, 491-492; 283 NW 659 (1939), quoting Thurston v Prentiss, 1 Mich 193, 200 (1849). Accord, Monroe Beverage Co v Stroh Brewery Co, 454 Mich 41, 454; 559 NW2d 297 (1997). Stated differently,

"when a statute creates a new right or imposes a new duty having no counterpart in the common law, the remedies provided in the statute for violation are exclusive and not cumulative." Covell v Spengler, 141 Mich App 76, 82-83; 366 NW2d 76 (1985).

Under the common law, employers had no duty to protect employees from sexually harassing conduct by co-workers, management, or anyone else. The Sixth Circuit clearly recognized this in Hartleip v McNeilab Inc, 83 F3d 767 (CA 6, 1996). There, the plaintiff attempted to characterize her sexual harassment claim as a common law contract claim, an argument the court soundly rejected:

> Michigan did not provide a common law remedy for discrimination in employment. Pompey [v General Motors Corp, 385 Mich 537, 552; 189 NW2d 243, 251 (1971)](race discrimination). Therefore, because the remedy sought by Hartleip did not exist at common law, and indeed her contract claim as framed by her complaint is premised on duties recognized in [Elliott-Larsen], her exclusive remedy lies in an action under [Elliott-Larsen]. See White v Electronic Data Systems Corp, No. 91-2379, 1992 WL 209355, at **3-4 (CA 6, Aug 28, 1992) (concluding that the separate common law remedy for discrimination recognized in Pompey did not survive the enactment of [Elliott-Larsen]).

83 F3d at 778.[7] See also Van Domelen v Menominee County, 935 F Supp 918, 921 (WD Mich, 1996) (same holding); Tallman v Tabor, 859 F Supp 1078, 1089 (ED Mich,

[7] Pompey v General Motors Corp, 385 Mich 537; 189 NW2d 243 (1971) re-affirmed the "general rule, in which Michigan is aligned with a strong majority of jurisdictions . . . that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by statute for its violation and nonperformance is exclusive." 385 Mich at 552. Pompey, however, recognized a narrow exception in the civil rights arena where a statute prohibited the wrongdoing but did not provide for civil liability. Id at 553. The Court recognized this exception as applying to race discrimination in employment prohibited by the Fair Employment Practices Act ("FEPA"), a predecessor to Elliott-Larsen. Specifically, while the FEPA identified only an administrative remedy through the Civil Rights Commission, the recently ratified Michigan Constitution that established the Commission provided for direct access to the court system. Id at 557-558. The court has repeatedly declined to extend this narrow exception. See e.g., Mack v City of Detroit, 467 Mich 186; 649 NW2d 47 (2002).

1994) (dismissing gross negligence claim where plaintiffs' claim was actually one of discriminatory treatment); Sherman v Optical Imaging Sys, 843 F Supp 1168, 1181 (ED Mich, 1994) (negligence claims dismissed; plaintiff's exclusive remedy for disability discrimination was under Michigan's Handicappers' Civil Rights Act).

Elliott-Larsen clearly created a new right to be free of a sexually hostile environment, and imposed a new duty on employers. Elliott-Larsen defines prohibited sex discrimination in employment as including a claim for a sexually hostile work environment. MCL 37.2103(i); MSA 3.548(103)(i). The elements of such an Elliott-Larsen claim encompass the type of conduct Plaintiff alleges occurred in her case:

> (1) the employee belonged to a protected group;
> (2) the employee was subjected to communication or conduct on the basis of sex;
> (3) the employee was subjected to unwelcome sexual conduct or communication;
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
> (5) *respondeat superior.*

Radtke v Everett, 442 Mich 368, 383-383; 501 NW2d 155 (1993); Chambers v Trettco Inc, 463 Mich 297, 312-313; 614 NW2d 910 (2000).

The law does not require that the perpetrator of the sexual misconduct also be an employee of the employer before a duty arises under Elliott-Larsen. To the contrary, an employer put on notice that its employee is being subjected to a sexually hostile work environment has a statutory duty to remedy the hostility, regardless of the identity of the individual engaging in the inappropriate behavior. See, e.g. Slayton v Michigan Host Inc, 144 Mich App 535; 376 NW2d 664 (1985) (imposing duty upon restaurant owner

where customers were harassing plaintiff-waitress). See also 29 CFR § 1604.11 (EEOC Guidelines on Discrimination Because of Sex: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer . . . knows or should have known of the conduct and fails to take immediate corrective action"); The Customer Is Not Always Right, supra, 84 Mich Bar J at 30-31.

Plaintiff testified that her employer, AVI, controlled access to the Wixom Plant cafeterias where Plaintiff worked. AVI prohibited non-AVI employees from access to the cafeterias, other than during break times, and prohibited non-AVI employees from entering the stockrooms and kitchens at any time. (Apx 178a-186a, 238a-239a). AVI also had its own policy and procedures for receiving and investigating sexual harassment complaints lodged by its employees. Plaintiff had availed herself of this policy before her alleged kissing encounters with Mr. Bennett, when another contractor's employee engaged in sexually inappropriate conduct toward Plaintiff. Moreover, upon learning in 2001 that Plaintiff claimed Mr. Bennett had allegedly engaged in sexually inappropriate conduct in 1998, AVI again attempted to follow its policy. But by that time Plaintiff had filed her lawsuit and Mr. Bennett had long been removed from the Wixom Plant. (Apx 175a-177a, 229a-232a, 234a-235a, 240a-244a, 275a, 278a-280a).

Hersh was not a case involving discrimination or harassment in the workplace. It was a claim involving violent physical assault -- misconduct that, unlike discrimination, has long been recognized as a tort under the common law. On the other hand, Plaintiff's claim here is one of discrimination, pre-empted by Elliott-Larsen, and Plaintiff

could have pursued a remedy under that statute.

The Court of Appeals wrongly conflated negligent retention and sexual harassment, opining that Ford may have been on notice of "Bennett's sexually derogatory conduct towards female employees." (Apx 19a). "Sexually derogatory conduct towards female employees" is not an injury under the common law (i.e., outside of Elliott-Larsen). If Mr. Bennett committed a common law wrong against Plaintiff, it was because it was an assault and battery, like a punch in the nose, not because it was "sexual." For purposes of a negligent retention claim, the issue would be whether Ford knew Mr. Bennett would physically batter someone, not whether he would "sexually harass" someone or act in a "sexually derogatory" manner, because that simply is not a wrong outside of Elliott-Larsen. The misdemeanor conviction, even if it suggested a propensity for "sexually derogatory behavior," did not suggest Mr. Bennett had any propensity to engage in assault and battery.

Courts in other jurisdictions have properly refused to recognize a negligent retention claim where, as here, state anti-discrimination statutes provide the exclusive remedy. See e.g., Bruner v Yellowstone County, 272 Mont 261, 267; 900 P2d 901 (1995) (dismissing negligent retention claim; state human rights law encompassed alleged injury and provided exclusive remedy where plaintiff claimed she was forcibly kissed); LaCanne v AAF McQuay Inc, No Civ 00-1773 (DWF/AJB) (D Minn, Oct 30, 2001) (text at 2001 WL 1344217) (dismissing plaintiff's negligent retention/supervision claims that were based on same facts as her sexual harassment claim). Because the alleged injury underlying Plaintiff's negligent retention claim is the same injury she claims under Elliott-Larsen, Elliott-Larsen provided Plaintiff's exclusive remedy.

In light of the Michigan Legislature's enactment of an exclusive statutory remedy for workplace discrimination, including the very type of sexual misconduct Plaintiff alleges in her Complaint, Plaintiff's and the Court of Appeals' construction of Hersh was far too broad. This Court should reject the expansion of tort liability into a setting governed by Elliott-Larsen, and reinstate the trial court's dismissal order.

4. The Rules Of Evidence Similarly Forbid A Negligent Retention Theory That Requires Admission Of "Propensity" Evidence.

This Court decided Hersh in 1971. Seven years later, in 1978, the Michigan Rules of Evidence were adopted. Included among these rules was MRE 404, which generally precludes the admission of "propensity" or prior "bad acts" testimony. The language and intent of MRE 404, adopted after the Hersh ruling, cannot be reconciled with any interpretation of Hersh that requires admission into evidence of an employee's "propensity" to engage in sexual misconduct or mandates that such evidence presents a jury-submissible issue.

Submitting Mr. Bennett's misdemeanor conviction to a jury would also conflict with the policy underlying MRE 609 that expunged convictions are not admissible even for impeachment purposes. MRE 609(d). As a leading commentator has noted regarding the Federal Rule of Evidence that is identical to MRE 609(d): "Excluding the evidence where the witness has been rehabilitated makes sense since rehabilitation is inconsistent with an assumption essential to the logic of admitting conviction evidence: the witness has a propensity toward lawlessness and, thus, may commit perjury." Wright & Gold, Federal Practice and Procedure: Evidence § 6137 (West 1993).

Plaintiff admits she intends to use Mr. Bennett's subsequently expunged record involving individuals never employed by Ford or at the Wixom Plant as "notice" that Mr.

Bennett had a "propensity" to sexually harass employees and other women in the workplace, particularly Plaintiff, so as to give rise to a duty to not retain him as an employee. The gist of Plaintiff's argument is really this: If an employer receives information that one of its employees has engaged in inappropriate off-premises conduct of a sexual nature with female non-employees, the employer is on permanent notice that the employee will jeopardize his or her employment by engaging in a very different kind of sexual misconduct with virtually every female employee he encounters. There is absolutely no authority or logic for making this leap. In fact, the case law addressing this issue is to the contrary. Murdock v Higgins, supra, 454 Mich at 59. See also, Tomson v Stephan, 705 F Supp 530, 536 (D Kan, 1989) (excluding evidence that defendant had made sexual advances outside the workplace because they were not directed toward an employee).

While MRE 404 provides that prior "bad acts" evidence "may . . . be admissible" for non-character purposes, MRE 404(b), neither Plaintiff nor the Court of Appeals undertook the analysis required under MRE 404, including the requirement that the admission of a prior "bad act" under MRE 404(b) must not violate MRE 403. People v VanderVliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993). As this Court held in Vandervliet,

> Other acts evidence is not admissible simply because it does not violate MRE 404(b). Rather, a "determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403."

444 Mich at 74-75, quoting 28 USCA, p 196, advisory committee notes to FRE 404(b).

Two trial judges and two panels of the Court of Appeals have considered the admissibility of Mr. Bennett's misdemeanor conviction on the issue of "notice" to Ford. All have ruled the conviction inadmissible under MRE 403. In each case, the conviction was found to have marginal, if any, relevance to the issue of "notice" to Ford, and had to be excluded because it was overwhelmingly prejudicial in nature. See Elezovic v Ford Motor Company and Daniel P. Bennett, Wayne County Circuit Court No. 99-934515-NO (Judge MacDonald) (Apx 70a-71a, 400a-404a) aff'd, 259 Mich App at 187; Maldonado v Ford Motor Company and Daniel P. Bennett, Wayne County Circuit Court No. 00-018619-NO (Judges MacDonald and Giovan) (Apx 70a-71a, 400a-408a), affirmed per curiam (Apx 46a-47a). The trial judge in this case, Judge Potts, had not yet ruled on admissibility in the first instance. However, Judge Potts similarly required that references to the conviction be filed under seal, primarily because the conviction had been expunged. (Apx 31a-35a).

Whether or not an employee's "propensity" to engage in criminal activity was appropriate for jury consideration prior to 1978, so as to require admission of a conviction into evidence, this ceased to be the case with the adoption in 1978 of MRE 404 and MRE 403. That result is especially compelling here. Four formal rulings have declared the evidence in question inadmissible under MRE 403 because of its minimal probative value and overwhelmingly prejudicial effect, and another judge has ruled that Mr. Bennett must now be considered as having never been convicted.

B. If Sexual Harassment Can Be Asserted Under A "Negligent Retention" Theory, Elements Of The Claim Should Not Impose A Greater Duty On Employers Than Those Created By The Legislature Under Elliott-Larsen.

If an expanded theory of negligent retention is to be permitted in a sexual

harassment setting, then its basic elements become questions of major significance to the state's jurisprudence. Imposing new or expanded burdens on employers and businesses in this State has wide-ranging and often unanticipated consequences that should not be lightly imposed. Because the standard advocated by Plaintiff in the courts below, and evidently adopted by the Court of Appeals, is a standard that is inconsistent with both legislative intent and hornbook tort principles, this Court should at a minimum set forth appropriate parameters for this cause of action for the benefit of the bench and bar. Those parameters should not impose a greater duty on employers than the duty determined appropriate by the Legislature in enacting Elliott-Larsen.

1. The Standard Should Be No Less Than The *Respondeat Superior* Standard.

Especially where the Legislature has shown its intention to provide an exclusive remedy for wrongful conduct (as is the case for workplace sexual harassment), it would be anomalous to permit an parallel common law theory that imposes a lesser burden on a plaintiff than her statutory burden. But that is essentially what the Court of Appeals did. To bring a hostile environment claim under the Elliott-Larsen Act, a plaintiff must prove *respondeat superior*. Chambers v Trettco Inc, supra, 463 Mich at 311. To prove this element, the plaintiff must establish "fault" on the defendant's part by proving (1) she provided "reasonable notice" of the complained of sexual conduct, and (2) despite this reasonable notice, the defendant failed to take prompt remedial action. Chambers, 463 Mich at 312-313.

Here, Plaintiff admittedly did not give her employer AVI notice, and AVI had no opportunity to investigate and take whatever remedial action might have been warranted. Plaintiff also did not follow Ford's sexual harassment policy by reporting Mr.

Bennett's alleged conduct in accordance with Ford's procedures. (Apx 393a). Had she provided reasonable notice to AVI, or even to Ford, AVI presumably would have investigated Plaintiff's workplace, and AVI (with Ford's assistance, if needed) would have taken steps to remedy the situation. This is the elementary bi-lateral process envisioned by the Legislature under Elliott-Larsen for addressing workplace sexual harassment issues.

Of course, had Plaintiff proceeded in this manner, she would be bound by the standard for *respondeat superior*, i.e., notice to the defendant, giving rise to the obligation to investigate, and, if warranted, take remedial action. Chambers, 463 Mich at 312-313. But having either neglected or chosen not to fulfill her burden under Elliott-Larsen, Plaintiff should not be rewarded with a cause of action in tort that imposes a lighter burden on her than the statute would impose. Allowing that would subvert the intent of the Michigan Legislature, and encourage others to ignore their statutory duties. Therefore, if Plaintiff is permitted to proceed at all under a negligent retention theory, her burden of proof as to its core elements should be no less than her burden under Elliott-Larsen.

2. The Elliott-Larsen Act's "Notice" Requirement For *Respondeat Superior* Liability Was Not Satisfied Here.

Under Elliott-Larsen, a plaintiff can raise a question of material fact on the issue of "notice" in one of only two ways -- by proving either (1) actual notice or (2) constructive notice. Sheridan v Forest Hills Public Schools, 247 Mich App 611, 621; 637 NW2d 536 (2001), lv den, 466 Mich 888; 646 NW2d 475 (2002). To show actual notice, a plaintiff would have to "show that she complained to higher management of the harassment." Id, quoting McCarthy v State Farm Ins Co, 170 Mich App 451, 457; 428

NW2d 692 (1988). To prove constructive notice, Plaintiff would have to demonstrate the harassment was so pervasive that the employer's knowledge that Plaintiff's work environment was sexually hostile may be inferred. Id. See also Elezovic v Ford Motor Company, supra, 259 Mich App at 193 ("an employer is not liable for a claim of sexual harassment if it does not have actual or constructive notice").

The Court in Chambers, supra, addressed this "notice" standard, and relied on a federal case, Perry v Harris Chernin Inc, 126 F3d 1010 (CA 7, 1997), which outlines the notice requirement with specificity. Chambers, 463 Mich at 319. The court in Perry held that the plaintiff did not provide either actual or constructive notice because she did not report the conduct despite the availability of a complaint procedure (actual notice), and because no one witnessed the alleged perpetrator engaging in sexually harassing conduct toward the plaintiff (constructive notice). Perry, 126 F3d at 1014. The Perry court reasoned that, to impose liability where the plaintiff did not report the conduct and no one witnessed it would amount to strict liability. Id.

The standard Plaintiff has advocated in this case -- which the Court of Appeals essentially adopted -- was exactly what this Court said in Chambers the law does not permit. Plaintiff's standard would amount to the imposition of strict liability because Plaintiff did not report Mr. Bennett's conduct in accordance with established procedures, nor was there a single witness to it. (Apx 187a-189a, 201a-203a, 393a). There was no actual notice. There was no constructive notice. Essentially, Plaintiff's position was that she had virtually no burden at all, and the Court of Appeals agreed by sending the entire issue of notice to the jury.

Plaintiff's position is not only antithetical to Elliott-Larsen, it disregards hornbook

tort principles. A plaintiff proceeding under a negligence theory has many burdens of proof. For purposes of negligent retention, a plaintiff would have to prove, *inter alia*, (1) "propensity" to commit a violent offense -- which is a greater (not lesser) burden than simply proving that misconduct toward the plaintiff occurred; (2) "notice" to the defendant of this propensity (at least an equal burden to that under Elliott-Larsen); and (3) that the plaintiff was a foreseeable victim of the propensity. See Connes v Molalla Transport Sys Inc, supra, 831 P2d at 1321.

Under Elliott-Larsen, "actual notice" does not occur unless a complaint or report is made to "higher management" that the plaintiff is being subjected to a sexually hostile work environment. Sheridan v Forest Hills, 247 Mich App at 621. This means "someone in the employers' chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." Id at 622. See also Jager v Nationwide Truck Brokers Inc, 252 Mich App 464, 475-476; 652 NW2d 503 (2002) (plaintiff's notice to manager who did not have decision-making authority over alleged harasser was inadequate), lv den 468 Mich 884; 661 NW2d 232 (2003). The rationale for this rule is obvious: Employers can only act through their agents, and agents can only act within the authority assigned to them.

General principles of agency law do not change simply because a plaintiff may elect to sue under a negligence theory rather than Elliott-Larsen. If Plaintiff were to proceed on her tort claim, she should at a minimum be required to prove that there was a report to higher management before any duty can be imposed on Ford and before Ford can be held liable in tort for a breach of that duty. Plaintiff did not satisfy that burden. Indeed, the Court of Appeals absolved her of that burden by simply declaring a

jury issue on whether Ford had "notice" when it clearly did not.

a. There Is No Evidence That Any Employee Complained About Mr. Bennett Before His Alleged Misconduct Toward Plaintiff.

In reversing the trial court's grant of summary disposition on Plaintiff's negligent retention claim, the Court of Appeals stated: "In this case, Plaintiff put forth evidence that Bennett had a criminal record for indecent exposure, and furthermore, that a number of Ford employees came forward with claims of Bennett sexually harassing them." (Apx 19a).[8] The Court of Appeals either forgot or just ignored a dispositive fact about the Ford employees who "came forward with claims" concerning Mr. Bennett: Plaintiff produced no evidence -- and there is no evidence -- that any Ford employee (much less "a number" of Ford employees) came forward before Mr. Bennett's alleged misconduct toward Plaintiff. The Court of Appeals thereby violated a cardinal rule with respect to negligence: The defendant has to have notice of the condition before any duty arises. Freed v Simon, 370 Mich 473, 475; 122 NW2d 813 (1963). Indeed, under Elliott-Larsen, even a prior report by another employee claiming the same perpetrator engaged in sexual harassment toward that employee (as opposed to the plaintiff) does not alert the employer that the plaintiff is or may become a victim of sexual harassment. Sheridan v Forest Hills, supra, 247 Mich App at 627-628. This elementary concept is especially applicable in an enormous operation like the Wixom Plant (where Ford alone employed 3,500 employees in what was then the largest manufacturing facility in North America).

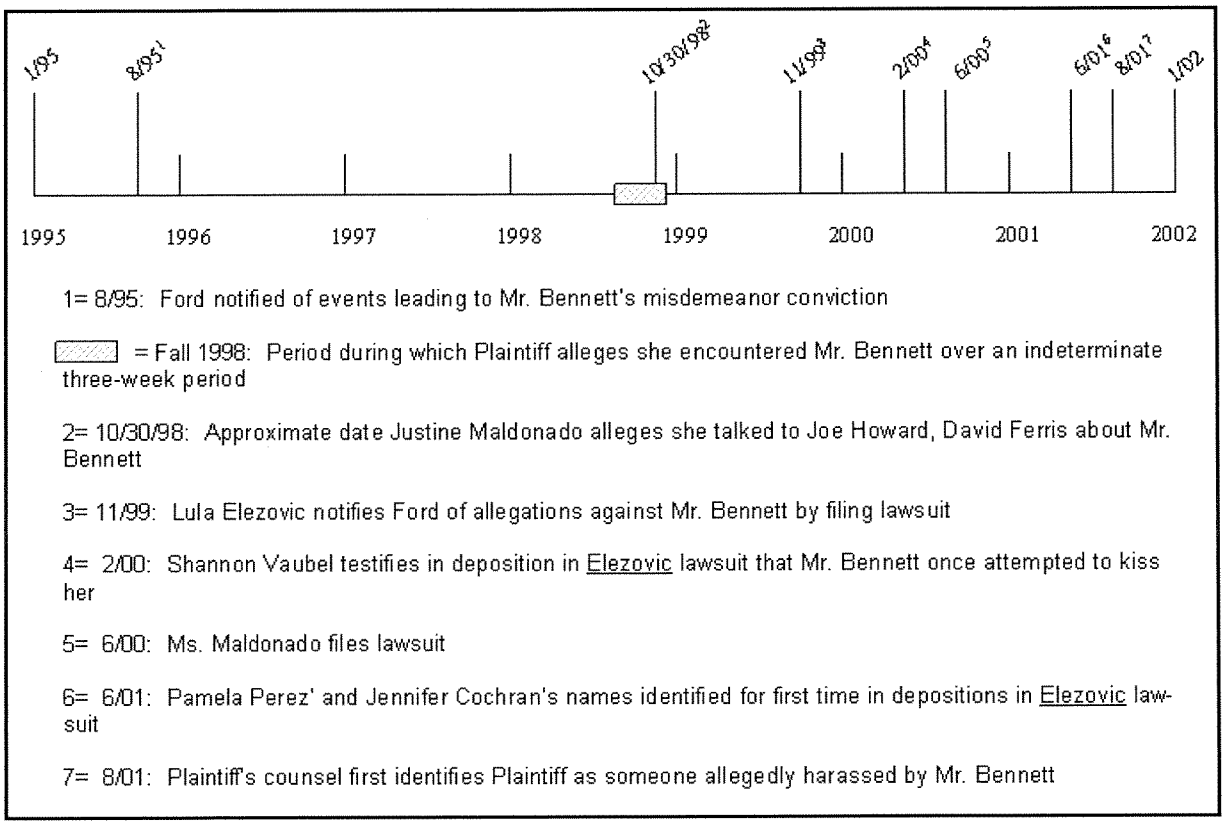
[8] Earlier in this Brief, we have shown the impropriety of relying on a prior misdemeanor conviction to create liability for negligent retention. Here we address the record evidence of so-called complaints by Ford employees.

In the instant case, most of the Ford employees who "came forward with claims" concerning Mr. Bennett did so by filing lawsuits of their own -- long after Mr. Bennett allegedly engaged in sexual misconduct toward Plaintiff. And when they did "come forward," well after-the-fact, they alleged conduct by Mr. Bennett that was unwitnessed by anyone else, eliminating the potential for constructive notice. The pertinent evidence concerning when and how these Ford employees "came forward," and what Ford could have possibly known concerning their complaints in the fall of 1998 when Plaintiff claims she was sexually harassed, is summarized here:

> A. Lula Elezovic: Ms. Elezovic claimed Mr. Bennett exposed himself to her on a single occasion in summer 1995 in a remote outdoor location at the Wixom plant. There were no witnesses. The trial court held that Ford had no notice of alleged wrongdoing by Mr. Bennett toward Ms. Elezovic as a matter of law until she filed her lawsuit in November 1999, i.e., at least one year after Plaintiff's alleged encounters with Mr. Bennett in the fall of 1998. Elezovic v Ford, supra, 259 Mich App at 193-197.
>
> B. Pamela Perez: Ms. Perez also brought her own lawsuit. She alleged Mr. Bennett exposed himself on a single occasion in the summer of 1999, i.e., after the alleged events involving Plaintiff. There were no witnesses. Ford did not learn of this purported incident until June 2001, when Plaintiff's counsel mentioned her name in a deposition in Ms. Maldonado's lawsuit. (Apx 62a, 68a, 394a).
>
> C. Jennifer Cochran: Ms. Cochran claimed Mr. Bennett once handed her two $100 bills while she was working on a Wixom Plant assembly line, and said something about getting a hotel room. She thought he was joking and handed the money back. They both laughed. There were no witnesses to this exchange. Ford knew nothing about any interaction between Ms. Cochran and Mr. Bennett until June 2001, when Ms. Perez mentioned her in a deposition in Ms. Elezovic's lawsuit. (Apx 123a).
>
> D. Shannon Vaubel: Ms. Vaubel claimed Mr. Bennett once attempted to kiss her in her father's office at the Wixom Plant. There were no witnesses. Ford first learned of Ms. Vaubel's allegation in February 2000, when Ms. Vaubel gave a deposition in Ms. Elezovic's lawsuit. (Apx 106a-107a, 394a).
>
> E. Justine Maldonado: Ms. Maldonado claimed Mr. Bennett exposed

himself in a car on two occasions in approximately February 1998, and followed her off I-275 to a floral shop parking lot in June 1998. She made no complaint or report when this allegedly happened. There were no witnesses. According to Ms. Maldonado, the first time she talked about Mr. Bennett to anyone at Ford (an uncle and a friend) was late October 1998. (Apx 310a, 311a).

Perhaps the sequence of events contained in the evidence before the trial court can more effectively be portrayed through a visual timeline:



As is clear from the foregoing, Plaintiff presented no evidence of a single allegation concerning workplace sexual misconduct by Mr. Bennett that was relayed to Ford's management prior to Plaintiff's alleged encounters with Mr. Bennett in the fall of 1998. That Ford later learned of these allegations (largely through discovery in lawsuits) is immaterial, inasmuch as a legal duty may not be imposed in retrospect where the requisite knowledge was lacking. It was only what was known to Ford before

Mr. Bennett allegedly harassed Plaintiff -- not what Ford learned afterwards -- that could give rise to a legal duty.

In the courts below, Plaintiff tried to obfuscate the timing of the complaints by Ford employees about Mr. Bennett, and apparently succeeded in confusing the Court of Appeals. With respect to Ms. Maldonado, Plaintiff also argued that Ford knew of Mr. Bennett's alleged misconduct vis-à-vis Ms. Maldonado before Mr. Bennett allegedly attempted to kiss Plaintiff. This argument was purely speculative in light of Plaintiff's own testimony and pleadings (Apx 362a-363a), and could not raise a genuine issue of material fact on this notice and timing question. Maiden v Rozwood, 461 Mich 109, 123; 597 NW2d 817 (1999) (only "admissible evidence" can defeat summary disposition); Karbel v Comerica Bank, 247 Mich App 90, 96-98; 635 NW2d 69 (2001) (conjecture and speculation must be disregarded), lv den, 466 Mich 854; 643 NW2d 574 (2002). But compounding its error, the Court of Appeals accepted Plaintiff's speculation on this notice and timing question by relying on Plaintiff's counsel's arguments -- rather than the record evidence -- that Ms. Maldonado had not only complained to Ford before Mr. Bennett's alleged misconduct toward Plaintiff, but that Ms. Maldonado had complained to "higher management officials" at Ford. (Apx 20a). This was not supported by the record, and was not true.

Plaintiff admitted she cannot say when Mr. Bennett allegedly kissed her or tried to kiss her, apart from inconsistent generalization. By her account, it was either at some indeterminate time as early as September 1998 (as alleged in her Complaints), or as late as Thanksgiving 1998, or possibly somewhere in between (as she testified in her deposition). (Apx 56a, 166a-167a, 189a-193a, 206a, 208a, 216a, 246a-248a, 275a,

288a, 362a-363a). Plaintiff's "best guess" as to timing cannot sustain her burden of proof on this point. See Mason v Wal-Mart Stores Inc, 91 SW3d 738, 743-744 (Mo App, 2002) (evidence of complaints by others irrelevant on issue of notice where there was uncertainty as to whether complaints pre-dated harassment experienced by the plaintiff).

b. Ms. Maldonado's Alleged Complaints, Even If They Occurred Prior To Plaintiff's Encounters, Did Not Constitute Notice To Ford.

The Court of Appeals also erred in finding a question of fact on whether Ms. Maldonado's complaint was "referred to higher management" prior to any misconduct toward Plaintiff. The Court of Appeals simply pyramided speculation on top of speculation, giving credence once again to unsupported argument by Plaintiff's counsel. The record evidence establishes Ms. Maldonado did not complain to "higher management" concerning Mr. Bennett's alleged misconduct, either in late October 1998 or at any other time prior to December 1999 when she made an offhand reference to misconduct by Mr. Bennett when talking with a Labor Relations Representative about her holiday pay. (Apx 326a). Even then -- in December 1999, long after the events in Plaintiff's case -- she declined to cooperate with Ford's policy and procedures for sexual harassment complaints.

The record establishes that the most Ms. Maldonado did in late October 1998 (immediately before, during, or after the events in Plaintiff's case) was to have an impromptu conversation at her home with her uncle, Joe Howard, either on October 22, 1998 or sometime later while Ms. Maldonado was off work from Ford on an extended medical leave. (Apx 311a-312a). While Plaintiff's counsel, in the course of argument,

has repeatedly tried to promote Mr. Howard to "higher management," the uncontroverted evidence before the trial court was that Mr. Bennett and Mr. Howard were peers at Ford's Wixom Plant. Mr. Howard had no management authority over Mr. Bennett. (Apx 330-331a). Accordingly, Mr. Howard was not "higher management," as that term is defined under Michigan law, Sheridan v Forest Hills, supra, 247 Mich App at 622, and Mr. Howard did not report what his niece had said to anyone who was "higher management." (Apx 329a).[9] Indeed, Ms. Maldonado's expectation was that he would not do so, but rather, at most, would talk to his peer, Mr. Bennett. (Apx 312a, 326a).

On or about October 30, 1998, while still on medical leave, Ms. Maldonado stopped by the Wixom Plant where she ran into a close friend, Dave Ferris, outside the Labor Relations office, and supposedly said something about Mr. Bennett's alleged misconduct toward her. Ms. Maldonado and Mr. Ferris were bar mates and late night swimming companions. Mr. Ferris had once been a supervisor at the Wixom Plant, i.e., a lower level employee than Mr. Bennett, but had not been steadily employed since beginning a series of medical leaves in 1994. When Ms. Maldonado ran into Mr. Ferris that day, he had no ongoing position or responsibilities for Ford, and was temporarily "loaned" to the Labor Relations office to help with overflow clerical work while he awaited the results of a medical exam and negotiated a disability buy-out. He was not "higher management" (or management at all), nor was he a Labor Relations representative. (Apx 282a-283a, 340a-342a, 386a). Any conversation Ms. Maldonado

[9] Mr. Howard testified that he is certain he did not talk to his niece about Mr. Bennett until October 1999, at which time he still did not report anything to higher management. (Apx 328a-329a). For purposes of Defendants' summary disposition motion, however, Defendants accepted as true Ms. Maldonado's testimony concerning the timing of her conversation with her uncle.

had with Mr. Ferris was, at her insistence, between friends and off-the-record. (Apx 310a, 342a). Sometime later, Mr. Ferris testified, he had a brief 30-second impromptu conversation with Labor Relations Supervisor Jerome Rush, in which he mentioned Mr. Bennett, but Mr. Ferris does not recall when this happened. (Apx 342a, 344a-345a, 385a).

This is the record evidence supporting the Court of Appeals' statement in its opinion (Apx 20a) that Ms. Maldonado's complaints about Mr. Bennett were referred to higher management. Presumably, if the conversation between Mr. Ferris and Mr. Rush actually occurred, it was after Ms. Maldonado allegedly ran into Mr. Ferris on October 30, 1998 (Apx 310a), meaning it was sometime between November 1998 and December 1998, when Mr. Ferris's disability buy-out took effect. Mr. Ferris could be no more specific than that. (Apx 339a, 342a-344a). Like Plaintiff and Ms. Maldonado, he could only guess. The Court of Appeals erred in piling speculation upon speculation in holding that Ms. Maldonado not only complained before Plaintiff was allegedly sexually harassed, but that the complaint was referred to "higher management," and that these filaments of supposed evidence raised genuine issues of material fact on the critical questions of notice and timing.

In conclusion, if this Court is inclined to allow the superimposition of a common law tort theory (negligent retention) on what would otherwise be treated as a statutory sexual harassment claim, it should set parameters that avoid end-runs around the procedural and substantive rules for sexual harassment claims established by the Legislature under the Elliott-Larsen Act. Otherwise, the amorphous tort advocated by Plaintiff will render illusory the balance of rights and responsibilities crafted by the

Legislature and interpreted by this Court.

IV. RELIEF REQUESTED

Ford Motor Company respectfully requests that this Court reverse the Court of Appeals ruling on Plaintiff's negligent retention claim and reinstate the trial court's order dismissing Plaintiff's Complaint in its entirety.

Respectfully submitted,

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